

From: [Johnson, Elois](#)
To: [Orr, Katherine](#); [Mathieus, George](#); [Suplee, Mike](#); [Greeley, Carrie](#)
Subject: FW: Montana Mining Association Comments RE: Numeric Nutrient Standards Rule Package
Date: Tuesday, April 01, 2014 2:12:54 PM
Attachments: [MMA Comments Numeric Nutrient Standards 3-31-14.pdf](#)

Since these comments reference both MAR Notice No. 17-355 (Department) and 17-356 (Board), I included Carrie Greeley as a recipient of this e-mail. She was to receive comments pertaining to MAR Notice No. 17-355.

Elois

From: Tammy Johnson [mailto:tjohnson@montanamining.org]
Sent: Tuesday, April 01, 2014 1:04 PM
To: Johnson, Elois
Cc: 'Laura Feist'
Subject: Montana Mining Association Comments RE: Numeric Nutrient Standards Rule Package

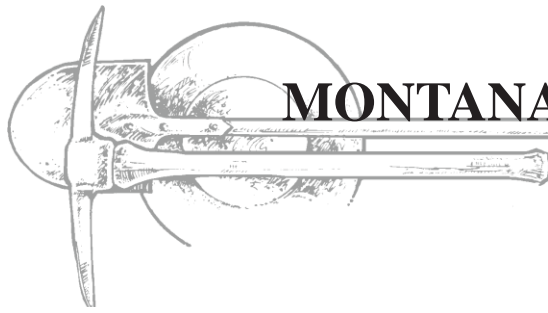
Dear Elois,

Attached please find the comments of the Montana Mining Association with regard to the Numeric Nutrient Standards Rule Packages before the Montana Board of Environmental Review and the Montana Department of Environmental Quality. The hard copy has been sent to you via USPS Priority Mail.

Sincerely yours,

Tammy Johnson

Tammy Johnson, Executive Director
Montana Mining Association
P.O. Box 5567
Helena, MT 59604
(406) 495-1444 / Office
(406) 491-1714 / Cell
tjohnson@montanamining.org
www.montanamining.org



MONTANA MINING ASSOCIATION

Office Address: 2301 Colonial Drive, Suite 2A ~ Helena, MT 59601

Mailing Address: P.O. Box 5567 ~ Helena, MT 59604

Telephone: (406) 495-1444

Email: info@montanamining.org

Website: <http://www.montanamining.org>

March 31, 2014

Montana Department of Environmental Quality
1520 E. 6th Avenue
P.O. Box 200901
Helena, Montana 59620-0901
Attention: Elois Johnson
Submitted via Email: ejohnson@mt.gov and USPS

RE: Draft Department Circulars DEQ-12A and 12-B; Associated Rules (MAR Notice 17-356 and MAR Notice 17-355); Base Numeric Nutrient Standards Implementation Guidance

Dear Ms. Johnson:

Thank you for the opportunity to submit comments on the above referenced rule package. The Montana Mining Association is a trade association of mineral developers, producers, refiners and vendors in the State of Montana. The mining industry is a major employer and taxpayer in Montana and we believe the continued viability and growth of our members' operations are significant factors in the economic health of our state and its citizens.

The Montana Mining Association (MMA), as a member of the Nutrient Work Group, has been engaged in the multi-year process which has led to this public comment period on the rule package which adopts numeric standards for nutrients and establishes the legislatively required variance package and DEQ guidance for implementation.

The MMA would like to express our appreciation to the Montana Department of Environmental Quality (DEQ) for the hard work and dedication of its staff in developing a five-piece package, that when taken as a whole, should provide the means to improve Montana's water quality by preventing detrimental levels of nutrients being discharged to waters in the state. The five documents are interrelated and though the Montana Board of Environmental Review and the Montana Department of Environmental Quality each has authority for adoption of separate pieces of the package, it is important to understand not only the correlation but to understand the importance of all five pieces moving forward together.

The MMA supported SB 367, the legislation authorizing this rulemaking effort. The following fundamental components are at the heart of our support for the legislation, our comments in this letter, and our unresolved concerns.

- Proposed nutrient standards are below the limits of current wastewater treatment technology.
- Compliance with proposed numeric nutrient concentrations, without the availability of variances will result in substantial and widespread economic impacts.
- Legislative intent was to make variances available to current dischargers and to new dischargers.
- Legislative intent was not to make the variances available to all dischargers only to have it nullified by the nondegradation review process.
- Unambiguous non-severability language must be included throughout the package to ensure, with respect to all dischargers, that the rules do not continue to bind permittees should permits with a general variance be disallowed or are not allowed to take effect.

MMA's comments include both general comments on the entire rule package and approach to implementing SB 367 and some specific comments on the proposed rules and DEQ Circulars 12A and 12B.

GENERAL COMMENTS

It is MMA's understanding that the legislative intent was that nutrient standards variances were to be made available to all dischargers. We wish to acknowledge the following found in the Guidance Document in Section 1.1 Scope – The provisions for general, individual, and alternative variances in Section 75-3-313, MCA, are available to all discharge permit holders and not limited to dischargers under permit on the effective dates of DEQ Circular DEQ 12-A or DEQ Circular 12-B. We sincerely appreciate the DEQ's acknowledgement of what we believe to be the legislative intent of SB 367. However, the fact that the Guidance document can be modified without any notification or process and that the Rule and DEQ Circular 12B are silent on the availability of the General Variance to private entities is a concern.

- Please state for the record in reply to this comment that the Department's position on issuance of the General Variance will be the same for private and public entities and that the General Variance will be available to new and increased dischargers on the same basis as for existing permit holders.

The Base Numeric Nutrient Standards Implementation Guidance document is not referenced by Rule or in DEQ-12A or DEQ-12B. This document is important in understanding how these standards will be interpreted and implemented and the lack of this reference limits the public's understanding of the rule package.

Additionally, there are several problems and inconsistencies with the Guidance that need to be corrected in order for there to be effective and transparent implementation by the Department.

- Please respond to this comment by indicating that DEQ intends to utilize the Guidance document to implement the Rule and to issue permits.

The economic test for applicability of the Individual Variance for private entities remains based on and referenced to the 1995 EPA draft guidance. The legislature established, and 75-5-313(5), MCA codifies, the finding that “treatment of wastewater to base numeric nutrient standards would result in substantial and widespread economic impacts”. This finding should preclude the need for an individual finding for either the Individual or Alternative Variances (as is the case for the General Variance).

- A modification of the procedure outlined in DEQ Circular 12B 3.2 could potentially be used to determine the level of capital and O&M expenditures that a discharger could afford, but should not be used to determine the availability of a variance.

Neither the Rule changes nor DEQ Circular 12B appropriately address what MMA sees as the legislative intent with regards to the application of the nondegradation requirements. MMA is of the opinion that it was not the intent of the Montana Legislature in SB 367 to establish a variance system only to have it nullified by the nondegradation review process.

- Clarification of the implementation of nondegradation for existing and future permits should be included in this rule package.

17.30.715(1) ARM retains nondegradation review for NO₂ and NO₃ and adds nondeg review for TN and TP. With the adoption of numeric standards for TN and TP at sub ppm levels, the significance level for these parameters at 10% of the standard outside of a mixing zone (17.30.637(1)(f), ARM) are very low (e.g. 27.5 ppb and 2.5 ppb respectively in the northern Rockies ecozone). The existing standard nondegradation evaluation process should recognize the difference between nutrients and other parameters for which water quality standards have been adopted.

- The nondegradation review needs to recognize the seasonal nature of the nutrient standards as well as recognize that the traditional concepts of chronic and acute effects are not appropriate.

MMA is concerned about how numeric standards would be applied in permits. One issue is the application of seasonal standards. Although DEQ has begun using the proposed numeric nutrient standards as *de facto* standards in TMDLs and permits, it does not appear that the seasonal nature of the proposed standards are being recognized in permits (for example the Butte Highlands permit).

- The seasonal nature of potential impacts from nutrients is clearly documented in DEQ’s standards development process and needs to be implemented in permits and TMDLs.

PROCESS

MMA feels as a member of the Nutrient Work Group that the instruction to “advise the department on the base numeric nutrient standards, the development of temporary nutrient criteria nutrient standards variances” was not adequately fulfilled at the end of the process when the Nutrient Work Group was not allowed to review or comment on the final rule package.

MMA requests as a member of the Nutrient Work Group and as indicated by 75-5-313(2)(b), ARM that we be informed of all draft permits that implement nutrient effluent limits or nutrient standards variances and any policy decisions the Department reaches in implementing the numeric nutrient standards or variances.

NON-SEVERABILITY CLAUSE

MMA supports the modification of the proposed non-severability clause. In the event of an EPA denial of an individual permit based on the inclusion of the general variance for a new or increased discharge should be added to the list of causes that would void the proposed rule package.

Specifically, The MMA asks the Board and the DEQ to amend the language employed by DEQ in the rule as noted in the italicized language as follows:

If (1) a court of competent jurisdiction declares 75-5-313, MCA, or any portion of that statute invalid, (2) the United States Environmental Protection Agency disapproves 75-5-313, MCA, or any portion of that statute, under 30 CFR 131.21, or if rules adopted pursuant to 75-5-313(6) or (7), MCA, expire and general variances are not available, *or (3) after the date of the promulgation of this rule, the United States environmental protection agency nullifies or otherwise disallows a permit with a general variance issued by the Department based upon the Department's inclusion of a general variance in the permit*, then (1)(e) and all references to DEQ-12A, base numeric nutrient standards and nutrient standards variances in ARM 17.30.201, 17.30.507, 17.30.516, 17.30.602, 17.30.622 through 17.30.629, 17.30.635, 17.30.702, and 17.30.715 are void, and the narrative water quality standards contained in ARM 17.30.637 are the standards for total nitrogen and total phosphorus in surface water, except for the Clark Fork River, for which the standards are the numeric standards in ARM 17.30.631.

Without the addition of this language to the rule, the rule will remain in force if EPA rejects a permit with a general variance for the permittee because EPA does not believe the permittee is entitled to a general variance.

MONTANA SHOULD NOT BE ECONOMICALLY DISADVANTAGED

MMA continues to express our concern with regard to the adoption and implementation of numeric standards at levels below the level of viable treatment technology and in advance of numeric nutrient standards adoption by most other states. We wish to remain positive about this process and of this rule package, but admittedly have concerns when we see that our immediate neighbors in Idaho, the Dakotas and Wyoming have not ventured down this path.

One thing is certain for now. Montana will have numeric nutrient standards in place when our neighbors do not. We do not want to see companies making a decision to not locate in Montana or to leave our state because it is technologically and economically infeasible to acquire the necessary permits to operate in this state. This overall package cannot result in a regulatory moratorium on new business in Montana.

SPECIFIC COMMENTS – DEQ CIRCULAR 12-A

2.0 – Applying criteria “as an annual average, not to be exceeded more than once in any three year period, on average.” is unclear. Please clarify what “one in any three year period, on average” means?

SPECIFIC COMMENTS – DEQ CIRCULAR 12-B

1.1 – The definition of “Monthly Average” is confusing. The period in which the base numeric nutrient standards apply is generally July 1 to September 30. If this definition is to be applied to permit compliance then it seems that it should reference the sum of the measurements for a parameter divided by the number of samples during the reporting period.

2.0 2nd paragraph last sentence on page 1 – *...(or an individual variance)...* Alternative Variance should be included here.

3.1 3rd paragraph – *Since the basis of this type of individual variance is related to the economic status of a community or permittee ...* The basis for an individual variance can also be limits of technology, which should be noted here.

SPECIFIC COMMENTS – BASE NUMERIC NUTRIENT STANDARDS IMPLEMENTATION GUIDANCE

1.1 Scope – MMA appreciates the inclusion of this statement, but continues to feel that this should be included in Rule and Circular DEQ-12B.

2.0 Reduction Steps – While it is useful for dischargers to have an idea of potential future changes in treatment standards associated with the General Variance, it would be appropriate in this section to indicate that these projected future treatment levels are targets and would be subject to rulemaking to implement. These target levels were not required by or specified by SB 367.

3.2 Private Sector Permittees – The finding by the legislature in SB 367 of significant and widespread impacts should apply to Individual Variances as well as the General Variance.

3.2.2 Completing the Substantial and Widespread Assessment Spreadsheet – The inclusion of a nondegradation waiver procedure based on significant and widespread economic impacts and generally following the EPA 1995 draft guidance was not discussed with the Nutrient Work Group and should not be included in this guidance package or the Work Sheet without input or consideration by the public. Further, it is not clear if the “cost model” work sheet available on DEQ’s web site and the reference cited here are the same. DEQ should clarify which version of the worksheet it intends to use and allow for public comment on the details in the worksheet.

In conclusion, the MMA is keenly aware of the amount of time, effort and talent that has been devoted to this overall process and wishes to say thank you and to express our appreciation to everyone involved. It has been a very large task which corresponds to the very large step Montana is taking as one of the early pioneers or adopters of the numeric nutrient standards process. The MMA will continue to stay engaged and trust that the DEQ will continue to work with our membership as we move forward. Again, thank you for the opportunity to submit our comments.

Sincerely yours,



Tamara J. Johnson
Executive Director
Email: tjohnson@montanamining.org

Cc: Water Policy Interim Committee
Environmental Quality Council